

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

NOV 25 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0200-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAVID G. MILLS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-50324 and CR-50983 (Consolidated)

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

David G. Mills

Florence
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In two causes, Nos. CR-50324 and CR-50983, petitioner David G. Mills was charged with multiple counts of sexual exploitation of a minor under the age of fifteen. He was convicted in 1996 of three counts of sexual exploitation of a minor under the age of

eighteen pursuant to a plea agreement entered in both causes. The trial court sentenced Mills to a partially aggravated prison term of eight years on one count and to consecutive, presumptive terms of five years on each of the remaining counts. Mills appealed twice; this court dismissed those appeals. *State v. Mills*, No. 2 CA-CR 96-0335 (order dismissing appeal filed June 28, 1996); *State v. Mills*, No. 2 CA-CR 00-0376 (order dismissing appeal filed Sept. 26, 2000). He also filed multiple petitions seeking this court's review of the trial court's denial of petitions for post-conviction relief. *State v. Mills*, No. 2 CA-CR 2005-0045-PR (decision order filed Sept. 15, 2005); *State v. Mills*, No. 2 CA-CR 2002-0281-PR (memorandum decision filed Nov. 26, 2003); *State v. Mills*, No. 2 CA-CR 01-0147-PR (memorandum decision filed Aug. 23, 2001); *State v. Mills*, Nos. 2 CA-CR 96-0726-PR, 2 CA-CR 96-0727-PR (consolidated) (memorandum decision filed Nov. 12, 1997). In this petition for review, Mills again challenges the trial court's order denying his latest request for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.

¶2 Absent an abuse by the trial court of its discretion to determine whether post-conviction relief is warranted, we will not disturb the trial court's ruling. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). An abuse of discretion includes an "erroneous ruling on a question of law, such as whether a post-conviction claim is or is not precluded." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no abuse of discretion here.

¶3 Mills contended in his petition for post-conviction relief that the trial court erred by sentencing him for offenses designated as dangerous crimes against children,

insisting this violated the plea agreement because the prosecutor had added that designation even though Mills had specifically refused to admit to it as part of that agreement. He argued this also violated his rights under *Blakely v. Washington*, 542 U.S. 296 (2004), which he asserted applies to his case in light of *Danforth v. Minnesota*, ___ U.S. ___, 128 S. Ct. 1029 (2008). Mills asserted *Danforth* changed the retroactivity analysis applicable by the states. And he claimed he should have been permitted to withdraw from his plea agreement because of the addition of this element. The trial court denied relief, finding nothing in *Danforth* required the state to provide defendants relief under the circumstances. The court also relied on *State v. Febles*, 210 Ariz. 589, 115 P.3d 629 (App. 2005). Consequently, the court ruled, *Blakely* does not apply retroactively to cases like Mills's, which was final in 1997, well before *Blakely* was decided. The trial court further noted that, because “this very same [*Blakely*] issue was already adjudicated on the merits (No. 2 CA-CR 2005-0045-PR) and this is the defendant's sixth successive petition for post-conviction relief,” the claim is precluded. *See* Ariz. R. Crim. P. 32.2(a)(2), (3).

¶4 Mills asserts the “simple question” on review is “was there an act or omission of a required act that strikes at the integrity of the proceedings during the defendant's sentencing?—fundamental error?” He seems to argue that fundamental error occurred here because of what he characterizes as a conspiracy between the prosecutor and the court to add an element to the offense to which he had agreed to plead guilty pursuant to the plea agreement. He again relies on *Danforth*, but he does not specify that it entitled him to relief under *Blakely*.

¶5 Mills has not sustained his burden of persuading this court that the trial court abused its discretion by denying relief on this, apparently his sixth, petition for post-conviction relief. Mills would only be entitled to relief based on *Danforth* if he had established it was a significant change in the law as contemplated by Rule 32.1(g). *See* Ariz. R. Crim. P. 32.2(b). But the Supreme Court merely decided in *Danforth* that “[n]either *Linkletter* [*v. Walker*, 381 U.S. 618 (1965),] nor *Teague* [*v. Lane*, 489 U.S. 288 (1989),] explicitly or implicitly constrained the States’ authority to provide remedies for a broader range of constitutional violations than are redressable on federal habeas.” ____ U.S. at ____, 128 S. Ct. at 1031. This holding does not establish Mills was entitled to post-conviction relief.

¶6 Mills’s claim does not implicate the retroactive application of any law; rather, he is simply challenging, as he has before, the validity of the sentence and possibly the plea based on an unsupported claim that a new element was added to the plea agreement that affected his sentence. But, even assuming his intent was to reassert a claim based on *Blakely* and *Danforth*, the trial court did not abuse its discretion. Nothing in *Danforth* alters the propriety of the trial court’s previous denial of relief based on *Blakely*. Mills was not entitled to relief pursuant to Rule 32.1(g).

¶7 Nor is Mills able to avoid the preclusive effect of Rule 32.2 simply by asserting fundamental error occurred during sentencing, as he states in his petition for review and briefly suggested in his petition for post-conviction relief. He has not established that error occurred in the first instance, much less that the error alleged was of such a nature that it

could not be waived by his failure to raise it in prior post-conviction proceedings. *See Swoopes*, 216 Ariz. 390, ¶¶ 40-41, 166 P.3d at 958 (even fundamental error subject to preclusion under Rule 32.2, unless constitutional right is implicated that cannot be waived and unless “defendant personally” waives right “knowingly, voluntarily, and intelligently”). Mills’s suggestion that he received ineffective assistance from counsel who represented him during his first post-conviction proceeding is similarly precluded. *See id.* ¶¶ 21-25, 40-41. Moreover, Mills only mentioned below that counsel had not asserted the claim in the first proceeding; he did not actually allege this as a claim of ineffective assistance of counsel until his petition for review. Therefore, that claim is not properly before us, and we will not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶8 The petition for review is granted, but for the reasons stated, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge